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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

GERALDINE GAVAGAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 22, 1960.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Southern District of Florida (R. 986–1010) are unreported. The opinion of the Court of Appeals for the Fifth Circuit (App., *infra*, pp. 22–42) is reported at 280 F. 2d 319.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1960 (App., *infra*, p. 43). The time for filing a petition for a writ of certiorari was extended

by an order of Mr. Justice Black, dated October 7, 1960, to and including November 21, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, because the voluntary efforts of the Coast Guard and Navy to rescue persons in distress at sea are "uniquely governmental" in size and organization, liability may be imposed upon the United States under the Federal Tort Claims Act for the failure of those efforts in circumstances where a private volunteer engaged in a similar activity would not be liable under the governing federal maritime law.

STATUTE INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq*, provides in pertinent part:

> § 1346. * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * *

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

STATEMENT

This case concerns the liability of the United States under the Federal Tort Claims Act for the unsuccessful efforts of the Coast Guard and Navy to rescue the crew of the fishing vessel DONALD RAY which was in distress in a storm on the high seas. The asserted liability is based upon the failure of the personnel involved in the rescue attempt to discover the vessel and to send surface vessels to her in time to save her crew.

1. *The Underlying Facts.* The DONALD RAY, a 55-foot shrimping vessel carrying a three-man crew, put out to sea on March 7, 1957, from its home port of Mayport, Florida, a fishing village approximately fifteen miles east of Jacksonville (R. 986). Late that evening, a 23 to 35 mile per hour wind arose, and early the following morning (March 8), small craft warnings were broadcast (R. 98, 100, 987). The entire crew of the DONALD RAY apparently were asleep at the time (R. 988) for the DONALD RAY was the only Mayport vessel which did not return to port after the storm arose (R. 190).[1]

[1] The record contains no explanation of the DONALD RAY's failure to return to port when the storm arose Thursday evening.

At approximately 9:00 a.m. on March 8, the office of the Captain of the Port, Jacksonville, (a Coast Guard facility) was notified that the DONALD RAY was overdue. Shortly thereafter, the captain of one of the other Mayport shrimpers, which had remained in port, reached the DONALD RAY by radio and learned that the vessel was in a sinking condition, in the area where several of the vessels had been fishing previously. This message was relayed to the Captain of the Port's office by telephone, together with a request for assistance and the information that there were no lifeboats or liferafts aboard the DONALD RAY (R. 988).

The Coast Guard responded promptly. One Coast Guard vessel, referred to as "the 83-footer," was underway within five minutes and a larger vessel, the buoy tender SWEETGUM, within approximately half an hour. Two Navy aircraft, a helicopter (the PEDRO) and an amphibian airplane (the DUMBO 1), were airborne and underway within minutes of the telephone call. The captain of the SWEETGUM was named as the on-scene commander of the rescue mission. Coordination of the various units was the responsibility of the Rescue Coordination Center (RCC) of the Seventh Coast Guard District Headquarters, which was located in Miami, Florida (R. 990–991).

The search area was approximately 45 miles ESE of a point (St. Johns Bar) adjoining the entrance to Jacksonville harbor (R. 422–423). This estimated position was consistent with the one given in the

DONALD RAY's radio reports (R. 143, 169–70, 179).[2] At this time, none of the Mayport shrimpers ventured out of port into the storm in order to attempt to save the DONALD RAY, and none of them offered their services to assist the Coast Guard in its efforts,[3] although the Coast Guard did not forbid or discourage them from doing so (R. 148, 180, 192, 203–4, 233). In accordance with instructions from RCC, the Coast Guard radio station at Jacksonville broadcast an all ships emergency, requesting a lookout for the DONALD RAY in the search area (R. 990).

The smaller of the Coast Guard vessels, the 83-footer, reached an area 40 to 42 miles ESE of St. Johns Bar shortly before 1:00 p.m. (R. 775). By this time winds had increased to 47 m.p.h. and the waves were "mountainous" (from 10 to 15 feet in height) (R. 653–654, 1092). Because of the weather, the vessel was severely damaged and unable to continue the rescue efforts (R. 775–6, 1092–1093, 1183). The SWEETGUM was then proceeding toward the 45-mile ESE position.

The DUMBO I continued its search in expanding patterns around the 45-mile ESE position. These patterns took the airplane to within 20–30 miles of shore and as far out as 65–70 miles, but nothing was ob-

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[2] The DONALD RAY never called the Coast Guard on the radio, and never sent an SOS or Mayday distress call. Its radio conversations were exclusively with the other Mayport shrimpers, the last occurring shortly after 11:00 a.m. (R. 232, 546).

[3] One of the Mayport vessels put out to sea shortly before midnight, after the winds of the storm had subsided somewhat, and several others joined the search the following morning (R. 233, 1001, 1205).

served except the SWEETGUM. At 2:30 p.m., the DUMBO 1 returned to its base for refueling (R. 424–427).

By 3:12 p.m., the SWEETGUM, having completed a search of the 45-mile ESE area, extended its search to an area 55 miles ESE of the bar in the belief that the DONALD RAY was drifting with the wind. Because of the severe storm, which was increasing in ferocity,[4] the captain of the SWEETGUM asked for airplane coverage only "as soon as weather moderates" (R. 342, 1095).

Nevertheless, the DUMBO 1, which had been refueled, took off at 4:00 p.m. to resume the search. At 4:14 p.m., on his way to the search area, the pilot of the DUMBO 1 spotted a vessel, approximately 18 miles off the coast and approximately 30 miles away from the 45-mile ESE position. Two low passes were sufficient to identify the vessel as the DONALD RAY, and the identification and position were radioed to shore at 4:23 p.m. (R. 432–437, 1096–1097).

The passes were so low that the DUMBO 1 was alongside the DONALD RAY. At this time the DONALD RAY was dead in the water, broadside to the weather and

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[4] By early evening, the winds were 60 m.p.h., and the waves were even higher (15 to 20 feet) than the "mountainous" waves earlier in the day (R. 655, 697, 727, 778). Experienced sailors testified it was the worst storm they had been in at sea (R. 727, 778).

[5] Because of difficulties in radio communication, the DUMBO 1 frequently talked to its home base, the Naval Air Station, Jacksonville (NAS), which then forwarded the information to RCC, Miami, by direct telephone line (App., *infra*, p. 27). NAS was never designated as a part of the rescue team (see R. 1116).

the three crew members, who were on deck wearing life jackets, waved their arms at the DUMBO 1. The vessel seemed to be floating "pretty good," her freeboard was remaining constant and her crew displayed no black anchors, red flags, flares, smoke fires, painted signs, or other signals for showing distress at sea. The Navy personnel in the DUMBO 1 had had little experience with fishing boats or rescues. The DUMBO 1 reported to NAS that the DONALD RAY did not appear to be sinking (R. 450–451, 804–805, 810–812, 814).

After the DUMBO 1 regained altitude, the crew mistook some whitecaps on the horizon for an approaching vessel. NAS called RCC, Miami, informing it of the positive identification and position of the DONALD RAY, and stated that she was in "no apparent trouble other than being dead in the water." The message also stated that the DUMBO 1 was remaining overhead to act as a homer for the "approaching vessel." Within five minutes after reporting the approach of a vessel, the crew of the DUMBO 1 corrected their mistake, and reported that no vessel was approaching. NAS apparently failed to transmit this information to RCC. The DUMBO 1 continued to circle above the DONALD RAY, keeping it in sight (R. 815–817, 995, 1131).

At this time, unknown to the Coast Guard, a large commercial tanker, the HENRY M. DAWES, was in the general area, on a run from Jacksonville to Baytown, Texas. At 5:36 p.m., the pilot of the DUMBO 1 spotted a large vessel between his position and shore, almost due west, approximately 5–7 miles distant. The ship was headed south. The DUMBO 1 informed the Coast

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Guard Radio Station in Jacksonville that it could not risk leaving the DONALD RAY to identify the ship. The radio station advised that it would try to contact the ship. At 5:44 p.m., the station reported that it had not yet identified the vessel. DUMBO I then advised that it would attempt to have identification made by another airplane which was in the area (R. 451–452, 1039). In reply to a query as to the kind of trouble the DONALD RAY was in, the DUMBO I reported that she was dead in the water with three or four persons on board, not apparently in immediate danger, but definitely needing help (R. 1039–1040).

At approximately 6:00 p.m., the DUMBO I's starboard engine developed an overheated carburetor, "a very dangerous affair" which might cause a fire or explosion in the engine. Nevertheless, the DUMBO I remained on duty "at some risk" to the lives of its crew (R. 482–483).

The SWEETGUM, which was approximately 35 miles away from the DONALD RAY when informed of her identification by the DUMBO I, turned to proceed there, estimating arrival time at 9 p.m. (R. 343, 348–349, 995). There was no other Coast Guard vessel in the vicinity which could have arrived on the scene before the SWEETGUM.

By 6:12 p.m., the DUMBO I had succeeded in getting the other airplane to identify the tanker as the HENRY M. DAWES. By 6:25 p.m., the airplane had attracted the attention of the DAWES and the DAWES turned to follow it. The Coast Guard radio station then contacted the DAWES and advised her that there was a disabled fishing vessel eight miles to the east, and re-

quested the DAWES to proceed there to see if assistance was required, and to remain on the scene until the expected arrival of the SWERTGEM at 9:00 p.m. The DAWES advised that it was so proceeding, but rather than heading east, headed west northwest (R. 1040–1041, 1195, 1229).

Sunset was at 6:24 p.m. The DUMBO 1, which continued to circle above the DONALD RAY, dropped flares to act as markers, since the DONALD RAY had no lights of its own. Visual contact became difficult to maintain and before 6:45 p.m., the DUMBO 1 lost sight of the DONALD RAY in the darkness, but continued to circle above the flares. Shortly thereafter, the DUMBO 1 was replaced by another Navy airplane which was equipped with radar which had a 10-mile range. That airplane was never able to locate the DONALD RAY on its radar, so that, presumably, the DONALD RAY sank before 7:00 p.m. The search continued, however, into the night and for three more days (R. 370–377, 401, 673, 800–802, 1001).

2. *Proceedings Below.* The administratrices of the estates of the three members of the crew of the DONALD RAY brought civil actions against the United States under the Tort Claims Act and the Death on the High

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* The radio station had given the DONALD RAY's position as eight miles east of the DAWES, 30.06 N., 81.05 W. Since the DAWES had never given the Coast Guard its position, only the DAWES could have known that the two positions were inconsistent. The DAWES, without advising the Coast Guard of the inconsistency, apparently ignored the eight miles east location and headed for the position identified by the coordinates (R. 389, 1041).

Seas Act. The cases were transferred to admiralty,[1] and consolidated for trial.

Three captains of Mayport shrimp boats testified that if, after the DUMBO I's discovery of the DONALD RAY, they had known that the Coast Guard had no surface vessels available to reach the scene before dark, they would have then taken their boats out to sea in an attempt to assist the DONALD RAY. There was no evidence that, in any circumstances, they would have gone out before the DUMBO I had located the stricken vessel; or that the shrimp boats had even a reasonable chance of saving the DONALD RAY or her crew in the severe storm[2] (R. 1000–1001).

At the conclusion of the trial, the district court found the personnel of the Coast Guard and the Navy negligent in the following respects (R. 1001–1002).

1. Their failure to locate the DONALD RAY before 4:14 p.m. on March 8.

2. The mistake of the crew of the DUMBO I in taking the whitecaps to be an approaching vessel and the failure of the Naval Air Station

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[1] The Death on the High Seas Act provides for suits "in admiralty." 46 U.S.C. 761.

[2] The evidence was that they could not have rendered effective assistance. The shrimpers were of the same type and size as the DONALD RAY, with approximately the same capabilities (R. 149, 189, 200). The strong winds (40 to 50 knots) and the high waves (15 to 20 feet) which plagued the DONALD RAY in danger, and crippled the larger and more powerful 83 footer, would have imperiled the other shrimpers (R. 182, 655, 698, 727, 776, 778, 1092). In such weather it was virtually impossible for one vessel to come alongside another to take off her crew without collision and, there was no other way for the shrimpers to take men off the boat (R. 657, 699, 722, 730; 702).

promptly to notify RCC Miami that the report of an approaching vessel was in error.

3. Their failure to consider the situation after the DUMBO had located the DONALD RAY as "one of distress and emergency" and immediately call upon all possible nongovernmental resources (particularly the DAWES and the Mayport shrimpers) for assistance.

The court concluded that decedents drowned at sea more than a marine league from shore "as a result of the negligence" of the personnel of the Coast Guard and Navy, and that decedents were free from negligence proximately contributing to their deaths. Judgment was entered against the United States in a total amount of $169,042 (R. 1005, 1007, 1008).

The Court of Appeals for the Fifth Circuit affirmed. It rejected the Government's principal argument that the Tort Claims Act requires that the liability of the United States for voluntary efforts to rescue those in peril on the high seas be limited to that of a private person undertaking such a rescue. The court found that the rescue effort of the United States, because of its size and organization, and the duties owed by the personnel of the Coast Guard and Navy, was "uniquely governmental" (App., *infra*, p. 24). For that reason it ruled that the liability of the United States should not be measured by the principles applicable to private persons voluntarily undertaking a rescue at sea—namely, that the salvor is not liable for an unsuccessful rescue unless he causes an independent and distinguishable injury to the person being rescued (App., *infra*, pp. 32–35). Finding no precedent for the liability of the United States for the performance of

the "uniquely governmental" rescue at sea, the court proceeded "to fashion and mold * * * substantive * * * aspects" of federal maritime law and to hold the United States liable for failure to exercise due care in the execution of the rescue mission (App., *infra*, pp. 37–38).

REASONS FOR GRANTING THE WRIT

By imposing a higher standard of liability upon the United States for voluntary rescue efforts at sea than maritime law imposes upon private voluntary rescuers (salvors), the Court of Appeals for the Fifth Circuit has committed a serious error of far reaching importance both in the general application of the Tort Claims Act and in the particular field of search and rescue efforts at sea. The court of appeals' refusal to apply the principles of private salvor liability to the United States is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Frank* v. *United States*, 250 F. 2d 178, certiorari denied, 356 U.S. 962. And by seizing upon the "uniquely governmental" aspect of the rescue efforts to impose liability upon the United States in circumstances where a private person would not be liable, the court below not only departed from the express language of the Tort Claims Act but also failed to heed this Court's admonition that, whether or not the activity is "uniquely governmental," the liability of the United States is that of a private person in like circumstances. *Indian Towing* v. *United States*, 350 U.S. 61.

1. Because rescue efforts at sea involve substantial risks and yet are to be encouraged in the public in-

terest,[9] the courts of admiralty[10] have been reluctant to impose liability upon a voluntary rescuer (called a salvor) acting in good faith. Accordingly, liability has been imposed only where the salvor in his efforts to save the vessel or person in distress has caused an injury to that vessel or person which is *distinct and separable* from the original peril which brought about the rescue efforts.

Where the alleged negligence of the would-be salvor has resulted only in failure to achieve a successful rescue, rather than in an independent and distinguishable injury, liability has uniformly been denied. *The Laura*, 14 Wall. 336; *United States* v. *Taylor*, 188 U.S. 283; *Dorrington* v. *City of Detroit*, 223 Fed. 232 (C.A. 6); *The S. C. Schenk*, 158 Fed. 54 (C.A. 6); *Frank* v. *United States*, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962; *The Henry Steers, Jr.*, 110 Fed. 578 (E.D. N.Y.); *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.); *Page* v. *United States*, 105 F. Supp. 99 (E.D. La.); *The Daniel Kern*, 27 F. 2d 920 (W.D. Wash.); compare *P. Dougherty* v. *United States*, 207 F. 2d 626, certiorari denied, 347 U.S. 912

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[9] See, *e.g.*, *The Blaireau*, 2 Cranch 240, 266; and *The Blackwall*, 10 Wall. 1, 12, 14.

[10] Since the injury here was consummated on the high seas, federal maritime law governs, although some of the acts of negligence occurred ashore. *Hess* v. *United States*, 361 U.S. 314, 318. Because the injury was consummated more than a marine league from shore, the federal Death on the High Seas Act provides the remedy and state jurisprudence is totally inapplicable. *Noel* v. *Linea Aeropostal Venezolana*, 247 F. 2d 677 (C.A. 2), certiorari denied, 355 U.S. 907. The court of appeals accepted these principles and purported to apply federal maritime law (App., *infra*, p. 23).

(where the court held no liability for ordinary negligence even though the injury was independent and distinguishable).

The only private counterpart to Coast Guard and Navy rescue missions is the person who goes to the aid of—and attempts to save—individuals and vessels in distress at sea. Like such persons, the United States is under no duty to persist in the effort once undertaken. As the court of appeals apparently recognized (App., *infra*, p. 35), neither the statute authorizing Coast Guard rescue efforts (14 U.S.C. 88), nor the National Search and Rescue Plan,[11] imposed any duties upon the United States to those in peril. Therefore, if the United States were a private person, it would be considered a voluntary salvor[12] and, under the applicable maritime rules of liability, would not be liable in this case since the actions of the government personnel admittedly caused no injury independent and distinguishable from the original peril to the DONALD RAY.

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[11] This plan is an agreement among various Government agencies and departments which allocates authority, equipment, and personnel so that the Government's resources may be used as efficiently as possible in search and rescue operations (R. 1283-1296).

[12] At one point, the court of appeals endeavored to analogize the United States to a private person who has a contract to rescue persons in peril (App., *infra*, pp. 35-36). The analogy is without substance. The United States had no contract with respondents' decedents, or anyone else, to undertake the rescue. Where the United States undertakes a noncontractual function, its liability under the Tort Claims Act is measured by the liability of a private volunteer, not by that of a person under a contractual duty. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64, 65.

2. The Tort Claims Act expressly equates the liability of the United States to that of a private person. Under 28 U.S.C. 1346(b), *supra*, pp. 2-3, jurisdiction is conferred upon the district courts over claims based upon the negligent or wrongful act or omission of any employee of the Government, while acting in the scope of his employment, "under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Under 28 U.S.C. 2674 liability is imposed only "in the same manner and to the same extent *as a private individual* under like circumstances" would be liable (emphasis added).

Notwithstanding those clear statutory directives, the court of appeals held that the liability of the United States here was not governed by the principles applicable to private salvors. The basis for its holding was that the rescue mission was "uniquely governmental" in size and organization and the participants in the mission were under a duty (albeit to the Government rather than to those in peril) to make the search and to continue their efforts until assigned elsewhere.[15] From that holding, the court went on to conclude that the United States was liable for the deaths of respondents' decedents even though a private volunteer would not have been liable in like circumstances, explicitly acknowledging that its de-

[15] But, as the court failed to note, the employees of a private salvor presumably are under a similar duty to their employer to search and to continue their efforts until their employer instructs them to the contrary. That duty, of course, imposes no liability upon the salvor to the third persons who are the objects of the search.

cision should not "disturb the jurisprudence on the run-of-the-mill private salvage * * * " cases (App., *infra*, p. 37).

In *Indian Towing Co.* v. *United States*, 350 U.S. 61, this Court rejected the theory that the "uniquely governmental" nature of an activity renders inapplicable the mandate of Section 1346(b). And, in *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319, which involved fire-fighting activities of the Forest Service as "uniquely governmental" in size and organization as the rescue services of the Coast Guard and Navy, the Court reiterated:

> * * * [A]s we recently held in *Indian Towing Co.* v. *United States*, 350 U.S. 61, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the [place] where the acts occurred.

To be sure, the precise question in both *Indian Towing* and *Rayonier* was whether the "uniquely governmental" nature of the activity justified the exoneration of the United States in circumstances where there would be liability upon a private person if he were to engage in such an activity. But the rationale of those decisions—that the Congressional purpose was to compensate those injured through "negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable" (*Indian Towing*, 350 U.S. at 68)—is, we submit, equally applicable to endeavors to impose *greater* liability upon the United States than

would be imposed upon a similarly situated private person. Just as "[t]here is no justification for [reading] exemptions into the Act beyond those provided by Congress" (*Rayonier*, 352 U.S. at 320), there is no warrant for extending the scope of the waiver of immunity beyond the terms of the statute.

3. The decision below that the Government's liability for the conduct of a rescue at sea is not to be measured by the liability of a private volunteer is in direct conflict with the holding of the Court of Appeals for the Third Circuit in *Frank* v. *United States*, 250 F. 2d 178, certiorari denied, 356 U.S. 962. In that case a Coast Guard vessel went to the assistance of a cabin cruiser imperiled by a storm. While the cruiser was being towed, she heeled sharply. As a result, one of her passengers fell into the water. In a suit under the Tort Claims Act, it was asserted that the Coast Guard had negligently failed to reach him in time to save him from drowning. It was shown at the trial that life saving rings had been secured to the Coast Guard vessel in a way which prevented them from being immediately available to be thrown to the decedent; that the boat's rudder was defective; and that the crew was substandard. The Third Circuit nevertheless determined that the United States was not liable, since, under the principles discussed above, a private salvor would not be liable in like circumstances (250 F. 2d at 179, 180):

> If the United States is liable at all for negligence of the Coast Guard in connection with an attempted rescue operation, the responsibility of this public agency rises no higher than

> that of a private salvor. Upon that limitation the full bench of this court was agreed in P. Dougherty Co. *v.* United States, 3 Cir., 1953, 207 F. 2d 626, certiorari denied 347 U.S. 912, 74 S. Ct. 476, 98 L. Ed. 1068, although on other points we were divided. We recognized that the Coast Guard, like a private salvor, renders voluntary assistance where no duty to help is owed the person or vessel in distress.
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> * * * * *
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> For such ineffectual effort a private salvor is not liable * * *. By parity of reasoning the United States is relieved of liability in this case.

The district courts which have been presented with the question have agreed with the Third Circuit that the liability of the United States for unsuccessful rescues at sea is no greater than that of a private salvor. *Page* v. *United States*, 105 F. Supp. 99 (E.D. La.); *Kalle P.* (*Hansen* v. *United States*), 1953 A.M.C. 1581.

4. Because of the rationale of the opinion, the decision of the court of appeals has a significance going far beyond liability for unsuccessful rescues at sea. If permitted to stand, it will serve as a strong precedent for the imposition of liability on the United States for the execution of a myriad of governmental activities of magnitude, in circumstances where a private person would not be held responsible.

Even limited to the particular field of rescues at sea, however, the decision is of large importance. During the fiscal year ending June 30, 1959, more than 15,000 vessels, 830 aircraft, and 64,000 persons were assisted

by the Coast Guard in such operations. More than 2,500 lives were saved or rescued from peril. At the same time, however, there were approximately 8,500 unsuccessful attempts to give assistance with no physical assistance actually being rendered." Statistical data for the fiscal year ending June 30, 1960, not yet published, reflect that, in the two Coast Guard Districts (Seventh and Eighth) which are located within the jurisdiction of the Fifth Circuit, there were a total of 2,800 vessels, 150 aircraft and almost 13,000 persons assisted, and 2,300 instances where assistance was attempted but not rendered. In view of the extensive scope of Coast Guard rescue operations, the holding of the court below that, if "negligence" can be found, the United States can be held liable for simply failing to effect a rescue has a practical importance—quite independent of the doctrinal significance of the court's reasoning—which by itself justifies review by this Court.

Finally, notwithstanding the court's express grounding of its decision on the peculiar nature of governmental rescue operations and its disclaimer that the decision affects the rules governing the "run-of-the-mill" private salvor, the opinion may nevertheless give rise to doubts as to the continued vitality within the Fifth Circuit of the settled principles of private

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[11] Annual Report of the Secretary of the Treasury for the fiscal year ended June 30, 1959, p. 146. The 1958 report reveals comparable figures, with approximately 1900 lives saved, and 8900 unsuccessful efforts. 1958 Report, p. 149.

salvor liability.[15] If so, that affords a further reason for review by this Court, for any implication that a private person undertaking a maritime rescue under perilous conditions may be held liable even though

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[15] Such doubts might arise from the court's rather ambiguous discussion, after holding that the Government's rescue operations were unique in nature and therefore subject to unique liabilities, of the "Good Samaritan" doctrine (App., *infra*, pp. 38-39). That discussion was in answer to the Government's argument that, since the Good Samaritan doctrine did not apply to private salvors (the only liability being for distinct and separable injuries), it could not apply to the Government, but that even if it did somehow apply to the Government its requirements were not met in this case. On a close reading of the opinion, it is clear that the court's discussion of the Good Samaritan doctrine was similarly limited. Having held that the Government's liability was not limited to that of a private salvor, the court then looked for "appropriate standards" by which to "fashion and mold" the substantive law governing that liability (App., *infra*, pp. 36-37). Pursuing that inquiry, it drew upon two alternative sources to define the Government's unique duties: (1) the general standard of reasonable care which "it is characteristic of the maritime law to apply * * * to nearly every situation" (App. *Infra*, p. 37) or, alternatively, (2) the duties imposed in other areas under the Good Samaritan doctrine (App., *infra*, pp. 38-39). That is, the discussion of Good Samaritan liability was premised upon, and not independent of, the first holding that the Government's duties were not limited to those of a private salvor and thus did not mean that the court would apply the Good Samaritan doctrine to a "run-of-the-mill" private salvor. Nevertheless, that interpretation of the opinion—although confirmed by the court's failure even to discuss the numerous cases limiting a private salvor's liability to distinct and independent injuries—becomes clear only against the background of the arguments made by the Government to which the opinion was directed, and, standing alone, the opinion may well cause doubt whether the Fifth Circuit might not hold even a private salvor liable under Good Samaritan principles.

his conduct has not resulted in an independent and distinguishable injury would conflict with the decisions of two other circuits,[16] the language of a third[17] and consistent district court rulings.[18] The question of private salvor liability is itself an important one, moreover, and any doubt as to the continued vitality of the present firmly-established rules would discourage voluntary salvage efforts and thus frustrate the humanitarian objectives of those rules.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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NOVEMBER 1960.

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[16] *Dorrington v. City of Detroit*, 223 Fed. 232 (C.A. 6); *The S. C. Schenk*, 158 Fed. 518 (C.A. 6); *Frank v. United States*, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962.

[17] *The Cape Race*, 18 F. 2d 79 (C.A. 2).

[18] *The Henry Steers, Jr.*, 110 Fed. 578 (E.D. N.Y.); *Page v. United States*, 105 F. Supp. 995 (E.D. La.); *The Daniel Kern*, 27 F. 2d 920 (W.D. Wash.); *Kalle P.* (*Hansen v. United States*), 1953 AMC 1581.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 18094

UNITED STATES OF AMERICA, APPELLANT

v.

GERALDINE GAVAGAN AS ADMINISTRATRIX OF THE ESTATE OF JOHN GORDON GAVAGAN, DECEASED, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Florida

(July 22, 1960)

Before RIVES, *Chief Judge*, and CAMERON and BROWN, *Circuit Judges*.

BROWN, *Circuit Judge*: This appeal concerns the Government's liability under the Federal Tort Claims Act[1] for death resulting from the manner in which

[1] The Federal Tort Claims Act 28 USCA § 1346(b) (1959 Supp.) provides: "Subject to the provisions of Chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States * * * for * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USCA § 2674 provides that the assumed liability is only "in the same manner and to the same extent as a private individual under like circumstances."

the Government undertook the unsuccessful rescue of the shrimper DONALD RAY and her crew off the Florida Coast. As the asserted tort was a maritime one occurring more than a marine league from shore, the applicable remedy for the wrongful death is the Death on the High Seas Act, 46 USCA § 761.[*] The District Court after an extended trial on a record which comprises 1294 printed pages plus extensive exhibits, allowed recovery. The Government appeals.

I

The Government in its approach persists in compressing this into the mold of private salvage at sea, so that it is a case of maritime salvage, neither more nor less. This note is the opening theme of its brief. "This case is the first one in which a district court has held the United States liable for the *failure* of its employees *to reach a vessel in distress in time* to save her crew. Indeed, * * * this case is the first in which *any* person has been held liable merely *for failing to arrive* at the scene of a vessel marooned in a storm *in time to rescue* her crew." (Emphasis supplied).

This implies that the attempted rescue failed because of negligent acts of those in command of the two Coast Guard vessels, the CG 83[†] and the Buoy Tender SWEETGUM, and that liability was imposed because one or both of these vessels made mistakes in the execution of the attempted salvage. This is far from the case. It is true, of course, that the CG 83, disabled, had withdrawn from the operation hours

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[*] *Hess* v. *United States*, 1960, 361 U.S. 314, 316, 80 S. Ct. 341, 4 L. Ed. 2d 305; *Noel* v. *Linea Aeropostal Venezolana*, 2 Cir., 1957, 247 F. 2d 677, cert. denied 355 U.S. 907, 78 S. Ct. 334, 2 L. Ed. 2d 262; *High* v. *Transocean Airlines*, 9 Cir., 1955, 230 F. 2d 780.

[†] Its number was CG 83463.

before and the SWEETGUM was 30 miles, and three hours, away. But the neglect was not in the failure of these two ships "to reach a vessel in distress in time." The neglect was that of persons ashore who were directing the whole operation. By 4:17 p.m. the DONALD RAY was positively spotted by a National Search and Rescue plane at a position 18 miles off the coast. For over three hours this plane kept in continuous direct visual contact with the DONALD RAY orbitting around her to guide surface or air units to the stricken vessel who, like the ninetieth and nine, while lost was now found. By a series of almost incomprehensible—and certainly tragic—mistakes of those ashore, and none of a kind requiring hard choices under the pressure of competing perils, *in extremis*, the DONALD RAY and her crew slipped off into the briny deep.

II

Although to suggest it is perhaps to precipitate a renewal by the Government of the contention so far unsuccessful that the Federal Tort Claims Act imposes no liability for uniquely governmental activities,[4] the fact is that this rescue project bore only limited resemblance to traditional salvage at sea. It was uniquely governmental, certainly in the sense of its size and organization. Few, if any, private concerns could mount such a vast undertaking.[5]

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[4] *Indian Towing Company* v. *United States*, 1955, 350 U.S. 60, 70 S.Ct. 122, 100 L.Ed. 48; *Rayonier, Inc.* v. *United States*, 1957, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed. 2d 354.

[5] The Government offered and the District Court admitted, although with evident doubt as to its probative value, uncontradicted evidence that the search for this little shrimper cost the Coast Guard nearly $70,000 and the Naval Air Force $30,000.

This activity was pursuant to the National Search and Rescue Plan (SAR) which had been promulgated in March 1956 by the President's Air Coordinating Committee[1] pursuant to the specific Recommendation No. 2 of the Civil Air Policy of May 1954.[2] It established three SAR Regions: (1) inland, (2) maritime, (3) overseas. The Air Force was designated as Regional SAR Coordinator for (1) inland region and the Coast Guard for the (2) maritime region. Within the organization of the Coast Guard the Commander, 7th Coast Guard District was responsible for the waters off Florida. The Plan called for the making of interservice agreements by the Regional SAR Coordinator (here Coast Guard) with the Armed Forces and governmental agencies. The purpose of such agreements was "to organize existing agencies and their facilities * * * in a basic network for rendering assistance both to military and non-military persons and property in distress * * *" and to "provide for the fullest practicable utilization of the facilities of such agencies in regional SAR missions under the Regional SAR Coordinator * * *." For delegation of the authority and responsibility of the Regional SAR Coordinator in territorial subdivisions, the Plan called for the establishment of an appropriate Rescue Coordination Center (RCC). The RCC had the immediate responsibility to "coordinate and, as appropriate, direct the operations of SAR facilities committed to any SAR mission * * *."

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[1] The Committee comprised the Secretaries of the Treasury, Defense, and Commerce Departments and the Chairman of the Federal Communications Commission and Civil Aeronautics Board, each of whom personally signed the Plan.

[2] The Civil Air Policy, May 1954, page 44:

"To provide an over-all Search and Rescue Plan for effective utilization of all available facilities to include provisions for the control and coordination of all types of Search and Rescue."

To achieve the broad humane objective of this Plan[8] it was perfectly natural that the Coast Guard was named as the Regional SAR Coordinator for the maritime Region. Such responsibilities are within those long imposed upon the Coast Guard and now covered by statute which provides that the Coast Guard "may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized."[9]

Operation of this Plan under the organic responsibility of the District Commander was committed to the Rescue Coordination Center (RCC) at Miami. RCC was responsible for the coordination of all units being used in any Search and Rescue operation in waters off the Florida Coast. In immediate charge of RCC was the Controller, here a Commissioned Coast Guard officer. For this operation RCC had effective supervisory command over these agencies and facilities: the Captain of the Port at Jacksonville (COTP Jax); Coast Guard radio station at Jacksonville (CG RAD-Jax); the Coast Guard vessels CG 83 and SWEET-

[8] The Plan states: "3 *Objective*. To establish a National Search and Rescue Plan which will integrate into a cooperative network available U.S. SAR facilities which will be coordinated in any one area by a single federal agency in order to afford greater protection of life and property of citizens of the United States and insure greater efficiency and economy. * * *."

[9] 14 USCA § 88 provides: "(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may: (1) perform any and all acts necessary to rescue and aid persons and protect and save property: * * *.

"(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized."

GCM;[1] and the SAR Unit of the Naval Air Station at Jacksonville (NAS-Jax). The planes (and crews) supplied by NAS-Jax were the amphibian PBM-5, a helicopter and CARIBOU I. Of course, the whole system, as in any organization, depended on communication for the effective transmission and evaluation of data to permit timely decisions to meet changing conditions.

III

We shall not undertake to discuss much of the evidence showing how this complex administrative machine operated. The tragedy in mistake of lives lost is heightened by the fact that the system operated so well down to the very point where success was within reach. At that time it broke down, not because of tempestuous weather or perils of an angry-crested sea, but through those simple human errors that make us all fallible.

The DONALD RAY, a 55-foot shrimper operating out of Mayport, a small fishing village at the mouth of St. John's River, left Mayport early March 7, 1957, for the fishing grounds ESE of Jacksonville. Other fishing vessels expected to follow her early on March 8. During the night of March 7 early March 8, the weather kicked up and small craft warnings were hoisted. The other vessels cancelled departures and

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[1] The Plan permits the designation of an on the scene commander. The Captain of the SWEETGUM was so named, but with respect to the critical actions here involved, he exercised no command responsibility, actual or implied.

Communication between these elements was as follows: RCC and NAS Jax by "Hot" Telephone Line; RCC and CG RAD Jax by teletype; RCC and CG vessels by CG RAD Jax; RCC and NAS Jax Planes primarily through NAS Jax "Hot" telephone lines although some messages went direct from NAS Jax Planes to CG RAD Jax for relay by teletype to RCC.

they expected the DONALD RAY to return to port. When the DONALD RAY did not return all became greatly concerned. The village had the common bond of fishermen and anxiety traveled fast. One of the fishermen called COP-Jax to report the DONALD RAY overdue. Before COP-Jax could compose a message for teletype to RCC at Miami one of the fishing vessels still in Mayport contacted the DONALD RAY by radio. The report passed on immediately to the Coast Guard was frightening. The DONALD RAY reported that she was in sinking condition, had no lifeboat or liferaft aboard, and was in need of immediate help. She reported that she had run but 4½ hours ESE and was then in 19 fathoms. Her engines were still operating which enabled the crew to hold the boat into the wind to try to work her into the beach. But the outlook was not bright since water was then up on the engine halfway to the clutch, the pumps had stopped, and they were bailing with buckets. COP-Jax teletyped this information to RCC.

Established for just such emergencies, the rescue machinery under RCC worked quickly. Within approximately a half an hour the CG 83 and the SWEETGUM, dispatched by RCC, were on their way. At 9:32 a.m. RCC ordered CG RAD-Jax to broadcast and repeat in fifteen minutes an all ships emergency. When fishermen from still another vessel again contacted the DONALD RAY the fathoms were put at 16. This information as well as the correction to 45 miles ESE was passed on to COP-Jax. It would take the SWEETGUM nearly three hours to reach the position first given (30 miles ESE Jacksonville bar) and over four hours to reach the point 45 miles ESE Jacksonville bar. In the meantime at the request of RCC the amphibian DUMBO 1, together with a helicopter were assigned by NAS-Jax. Aerial reconnaissance

by standard search patterns in the reported vicinity (45 miles ESE) was negative and the plane returned to her Jacksonville base for refueling about 2:30 p.m. Neither CG 83, SWEETGUM, nor the planes had been informed by RCC that the DONALD RAY's engines were working and she was trying to get in toward shore. In the meantime CG 83 had sustained heavy weather damage and she retired. The SWEETGUM continued her search in an area as far out as 55 miles.[2]

Then the miracle happened, or nearly did. DUMBO 1 resuming search flew directly east from her base at Jacksonville. At 4:14 p.m. the plane sighted a vessel. After two passes the DUMBO 1 positively identified the ship as the DONALD RAY. This fact and her position 18 miles off the Coast bearing 90 degrees were immediately reported by radio. Both CG RAD-Jax and NAS-Jax received this message. This position and that subsequently reported by DUMBO 1 at 4:41 p.m. as 81.5 W 30.7 N, 15 miles off Fleming Island fan marker, was approximately 30 miles SSE off Jacksonville Bar.

Here then occurred the error which had such decisive consequence both in the decisions and actions by RCC and in the ultimate failure of the rescue. The story is told in this recorded transcription as NAS-Jax relayed to RCC the message from DUMBO 1:

> "* * * DUMBO * * * confirmed * * * they have sighted and identified the craft in question and he has now located it dead in the water with no apparent trouble other than being dead in the water 18 miles east of the coastline on a

[2] Hotly contested below but immaterial to our disposition was the question whether the SWEETGUM paid proper heed to the subsequent report that the DONALD RAY was in 16 fathoms. The search area of the SWEETGUM was in 21-25 fathoms.

line directly due east of Fleming Island, they are homing overhead and will remain overhead to act as a homer for a Coast Guard ship which is approaching at this time. * * *"

To this RCC stated it had received "that information from" CG RAD-Jax and then added, "I would assume that is the Coast Guard SWEETGUM. Do you know any information on that?" But having asked, RCC paid no heed for NAS-Jax immediately replied, "I questioned that and they said it was not the SWEETGUM."

DUMBO 1 actually thought it saw a vessel approaching the DONALD RAY. But within five minutes DUMBO 1 realized that the "vessel" was an illusion from whitecaps on the sea. DUMBO 1 immediately reported this to NAS-Jax. Unfortunately, the first, and understandable, mistake in observation is now compounded by a second one far more serious. For NAS-Jax simply forgot to make the correction to RCC. This had decisive significance as the full reading of the RCC Controller's testimony revealed. Especially is this so in connection with the commercial tanker the SS HENRY M. DAWES, then actually within five miles of the position of the DONALD RAY and later, but too much later, diverted for the search.

RCC continued on in the belief that a vessel, probably the SWEETGUM, was approaching. How RCC could do so would defy explanation save that now RCC added to that of NAS-Jax an error of its own. Within less than an hour (at 5:10 p.m.), RCC received an estimated time of arrival (ETA) of the SWEETGUM at the reported position of the DONALD RAY. She was due at 9:00 p.m. But this seemed to have little effect. About this same time (5:36 p.m.) DUMBO 1 reported a "large ship about 5 miles heading south from Fishing Vessel * * *." DUMBO 1 was

afraid to leave her orbit over the DONALD RAY to ascertain the name of the vessel. When so advised CG RAD-Jax stated they would make every effort to contact the vessel. It is uncontradicted that —as both CG RAD-Jax and RCC knew,—the ss HENRY DAWES was guarding Channel 500 Key and by an auto-alarm a message "to all ships" would have raised her. But before CG RAD-Jax could send an all ships emergency they had to have authority from RCC, as RCC knew. The RCC Controller was hard pressed under cross examination to justify his decision not to obtain immediate contact with the known but unidentified merchantman through an all ships broadcast. Though it did not improve in plausibility by reiteration, he justified it repeatedly on the ground that it was not necessary since it was known that a vessel was approaching the DONALD RAY. This referred back, of course, to the erroneous but uncorrected report of DUMBO 1.

We are not here dealing with knowledge acquired by hindsight. The ss HENRY M. DAWES was known to be there. And RCC had every reason to expect that, as she later did, the HENRY DAWES would readily join in the search if asked. But still acting on erroneous information not corrected by NAS-Jax, and ignoring as well the certainty that the vessel thought to be "approaching" the DONALD RAY could not possibly be the SWEETGUM, RCC did nothing. DUMBO 1, however, was more resourceful. DUMBO 1 found another naval training airplane who circled the HENRY DAWES, alerted her attention, obtained her name and almost immediately CG RAD-Jax sent a message on 500 Key requesting assistance. But precious time had been lost for it was now 6:20 p.m. Unfortunately, the HENRY M. DAWES, steaming at 15 knots was at least 13 miles south of DONALD RAY's position. By the time

she turned about, proceeded on a reverse course for some time and corrected it to two more easterly positions given through CG RAD-Jax, darkness had closed in and neither the HENRY M. DAWES nor CARDFILE I could locate the DONALD RAY.

It completes the story to say that RCC knew that the SWEETGUM, like the CG 83, was effectually out of the project. With the SWEETGUM heading toward the reported position of DONALD RAY with an ETA of 9:00 p.m., not a single decision made by RCC from about 4:30 p.m. to 7:00 p.m. could have counted on her assistance in these critical daylight hours. Actually on her way the SWEETGUM took the derelict sailing sloop WINDSONG in tow shortly after 9:00 p.m. and headed for Jacksonville bar.

Thus we see that the critical mistakes were made not by men taking great personal risk in heroic salvage service under trying conditions, but by those ashore in the failure to pass on and evaluate vital information.[13]

IV

The Government's frontal attack is twofold. First, it insists, this was but salvage at sea, and under maritime law a salvor, even though guilty of ordinary negligence, is not liable for damage which is not

[13] We agree with the District Court that the report by DUMBO 4 that the DONALD RAY was "dead in the water with no apparent trouble" was grossly incorrect. Her free board then was 12 to 18 inches in contrast to the usual 5 to 6 feet. But in legal terms the neglect was again that of RCC since it could not credit any such report in the light of prior information directly from the DONALD RAY, the increasing mountainous seas and high winds with the vessel dead in the water without power. Indeed, even those on the DUMBO 1 knew and reported as much. Assenting to CG RAD-Jax's inquiry "then he is not in immediately danger?" DUMBO 1 made an important qualification, "it appears that way but they do not need help."

"independent" or "distinguishable." That being so, there is no liability under the Tort Claims Act since the Government's liability is only that of a private person. Second; even under the Good Samaritan Doctrine, there is no liability since this series of errors did not "worsen" the predicament of those on the DONALD RAY.

The theory presumably behind the asserted rule concerning non-distinguishable damage is that apprehension of liability for damages for unsuccessful ("negligent") rescue will deter those who might otherwise volunteer. A part of this approach is that the policy underlying maritime salvage is a liberal reward to encourage such humane pursuits. In a conceptual way the principal of non-liability is occasionally justified on the ground that the salvor has the unqualified and absolute right to abandon his efforts at any time prior to the moment he takes the property in his charge.[14]

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[14] The Government stresses the usual cases: *The Laura* (Norcross v. The Laura), 1872, 14 Wall. (81 U.S.) 336, 20 L. Ed. 813; *United States* v. *Taylor*, 1903, 188 U.S. 283, 23 S. Ct. 412, 47 L. Ed. 477; *Dorrington* v. *City of Detroit*, 6 Cir., 1915, 223 Fed. 232; *The S. C. Schenk*, 6 Cir., 1907, 158 Fed. 54; *The Henry Steers, Jr.*, E.D.N.Y., 1901, 110 Fed. 578; *Lacey* v. *United States*, D. Mass., 1951, 98 F. Supp. 219, 1951 AMC 1657; *P. Ze* v. *United States*, E.D. La., 1952, 105 F. Supp. 99, 1952 AMC 893; *The Daniel Keen*, W.D. Wash., 1928, 27 F. 2d 920; *Frank* v. *United States*, 3 Cir., 1957, 250 F. 2d 178, cert. denied, 356 U.S. 962, 78 S. Ct. 1000, 2 L. Ed. 2d 1069.

Of course, note must be taken of *P. Dougherty Co.* v. *United States*, 3 Cir., 1953, 207 F. 2d 626, 1953 AMC 1541, cert. denied, 347 U.S. 912, 74 S. Ct. 476, 98 L. Ed. 1068. The Government virtually concedes, as it must, that the major thesis of the Third Circuit—non-liability because of some omnipresent policy is untenable under *Rayonier, Inc.* v. *United States*, 1957, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354. The dissenting opinion of Chief Judge Biggs, characterized properly by the Government's

These highlights emphasize the contrast with the situation posed by this record. First, imposition of liability, i.e., a duty, will not deter performance of like search and rescue projects by the Government. The Government's vast machinery is put into operation, not out of any hope of reward,[9] but out of a policy determination on the highest executive level that the resources of governmental agencies should be exploited effectively to save life and property. Second, the only expressed limitation in the National SAR Plan is that cooperation by the Armed Services is not to interfere with the performance of their military missions. Except for that, there was no absolute right in any of the participants to abandon or withdraw from this rescue project. The National SAR Plan subjected all participants to Coast Guard

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brief as "an exhaustive and penetrating analysis," spares us the necessity of discussing these cases in detail. We would only say that this reveals just how little in the way of actual precedent is there to support some rather extravagant statements of the so called general rule. And see generally Norris, the Law of Salvage (1958) pages 205-212.

[9] Members of the Coast Guard, duty bound to perform salvage services under orders may not recover salvage. Norris, The Law of Salvage (1958) 90, 126-128. Naval personnel in the ordinary salvage situation are eligible and, with the consent of the Secretary of the Navy, may assert and litigate claims for salvage. Norris, *supra*, at 128-132. We need not determine it here, but we entertain doubt that there can be any valid distinction between Coast Guard and other governmental personnel who are jointly engaged on a rescue project pursuant to the NAS Plan. The Government undoubtedly has the right to claim and recover a salvage award for services of its vessels, merchant or public. Norris, *supra*, at 330. It is seldom, if ever, invoked because of the public service nature of this activity. Any hope of reward was certainly non-existent here. With expenditures of $100,000 (see note 5, *supra*) and a small shrimp vessel having but a fraction of that value if saved, the driving motive was the governmental policy to save life.

command and through it to immediate direction by RCC at Miami. Added to that is the traditional statutory function of the Coast Guard, note 9, *supra*. The Government's contention is that while these duties assuredly were imposed on the officers and men of these units and as a matter of internal discipline they had no discretion to decide that they wanted no further part in this search, this concerned solely the relationship between the Government and its employees (civil or military). We may assume that nonperformance by a government employee of an intragovernmental duty does not give rise to a civil right in the citizen adversely affected. But the fact remains that, on the analogy of private maritime salvage, these government employees had no right, either absolute or qualified, to abandon or withdraw. On the contrary they were bound to continue at least until in the good faith judgment of those in command, the interest of the Government required termination.[16]

If, despite the clear teaching of *Indian Towing Company* v. *United States*, *supra*, we must analogize to find some private activity just *like* this, the situation is more comparable to that of professional salvors operating under contract without regard to success or failure. In that situation the salvor is to be held to the performance of his undertaking,[17] and

[16] No such thing may be contemplated here. On the contrary, the search went on for three more days during which much additional equipment was deployed.

[17] See Norris, *supra*, at 290. The maritime law generally reads into contracts the duty to perform in a workmanlike manner. See, e.g., *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 1958, 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491; *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; S. G. Kolins & Owen Cecil, "Indemnity Suits By Vessel Owner Against Stevedoring Contractor: A Search for the Limits of the Ryan Doctrine," 27 INS. COUNSEL J. 282 (1960).

such a contract extinguishes all rights to the maritime lien and admiralty remedies open to the usual salvor.[18]

Indian Towing Company v. *United States*, *supra*, made clear that in the construction of the Tort Claims Act the vicarious liability was not to be measured by that of a private person "under the *same* circumstances." Rather, the Court pointed out, "the statutory language is 'under *like* circumstances * * *'" (emphasis supplied), 350 U.S. 61 at 64, 100 L. Ed. 48 at 53. As our discussion has shown what was undertaken here resembled private marine salvage in many ways. But it was something much more indeed. The Government may not escape liability because we cannot find any private person either who had done so or might undertake such a vast project for search and rescue. The Supreme Court rejected the argument that the Tort Claims Act "must be read as excluding liability in the performance of activities which private persons do not perform" with the consequence that "there would be no liability for negligent performance of 'uniquely governmental functions.'" 350 U.S. 61 at 64, 100 L. Ed. 48 at 53. This was reiterated most positively in *Rayonier, Inc.* v. *United States*, *supra*. Of course, to the extent that the activity is the same as that normally done by private persons the law there the maritime law of salvage would control. To the extent, however, that it is different then the case does not fail because of a void in the legal precedents. The court trying the case has the obligation to determine on appropriate standards what the law would be were there such a private person performing the unusual function. The Supreme Court expressed it this way. "The broad and just purpose which the statute was designed to effect

[18] See Norris, *supra*, at 260-266.

was to compensate the victims of negligence in the conduct of governmental activities in circumstances *like unto those* in which a private person would be liable * * *." 350 U.S. 61 at 68, 100 L. Ed. 48 at 55–56. That leads us then to the time-honored capacity of the federal judiciary in the realm of maritime law to fashion and mold its substantive as well as procedural aspects. *Hess* v. *United States, supra.*

Since it is characteristic of the maritime law generally to apply the standard of reasonable care to nearly every situation, disdaining as it often does the fine spun distinctions indigenous to the common law, *Kermarec* v. *Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550, such a standard would surely be found appropriate here. Lest this be thought to disturb the jurisprudence on the run-of-the-mill private salvage problems we need to emphasize again the unique distinctions of this case. No negligent error is found with respect to vessels undertaking the rescue service. The mistakes were of those ashore. At the time these critical decisive mistakes were made the rescue efforts were still underway and they were not abandoned until days thereafter. All of the personnel and equipment deployed in this coordinated effort were there, not through a voluntary impulse to save but by virtue of a positive duty to carry out the decisions of RCC in accordance with the National SAR Plan.

The discretionary nature of the decision to undertake the rescue at the outset or the discretionary right to abandon—which was never exercised—does not alter the duty owing by those ashore and in command during the time the operation went on. In this respect it is virtually the same as *Indian Towing*. "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate

a light * * * and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act," 350 U.S. 61 at 69, 100 L. Ed. 48 at 56.[19]

In addition we are also of the opinion that the facts fully meet the requirements of the Good Samaritan doctrine. See *United States* v. *Lawler*, 5 Cir., 1955, 219 F. 2d 559 at 562; and 38 Am. Jur. "Negligence," § 17; Restatement, Torts, §§ 324, 323. The only element of any doubt is that of "worsening" the plight of the crew members of the DONALD RAY. We think that adequately established. The members of the families of the crew of the DONALD RAY and more especially their close friends among the fishermen on the other fishing vessels in Mayport were greatly exercised. They were maintaining a very close contact with the Coast Guard. The Coast Guard was likewise anxious to keep in contact with them. Had these persons known the true facts, steps could have been taken to reach the DONALD RAY in the time remaining up to 7:00 p.m., when darkness set in and visual contact was lost. As we pointed out, the ss HENRY M. DAWES was in the vicinity—not over 5 or 6 miles and 30 minutes away—and ready at the first request to respond to a search. And the other fishing vessels in Mayport were available to go

[19] *United States* v. *Reid*, 5 Cir., 1958, 251 F. 2d 691; *Fair* v. *United States*, 5 Cir., 1956, 234 F. 2d 288; *Eastern Air Lines* v. *Union Trust Co.*, D.C. Cir., 1955; 221 F. 2d 62; *Canadian Aviator* v. *United States*, 1945, 324 F.S. 215.

out as one did later that night and as several did during the succeeding days.

All of these interested persons were standing by, as they properly might, while the extensive, experienced facilities of the Coast Guard-directed search went on. But they were ignorant of several critical facts: first, actually there was no Coast Guard vessel within reach of the DONALD RAY though they understood that both the CG 83 and the SWEETGUM would be; second, RCC was mistakenly assuming that an "approaching" Coast Guard vessel would soon reach the derelict and consequently RCC did not think it necessary to summon other help. Ignorance of these facts and continued reliance upon the Coast Guard's celebrated skill made independent action unnecessary. But it reasonably kept them from taking action which, in all probability, would have been successful.[20]

V

The Government also contends that the evidence was insufficient to support the findings of negligence. It further asserts that the crew members of the DONALD RAY were guilty of such glaring contributory neg-

[20] The record shows that the Coast Guard was in constant contact with the fishermen in Mayport, and vice versa. The whole community of Jacksonville was aroused. The reported danger to the DONALD RAY and the rescue was the subject of great interest by radio, television and newspaper media. COP-Jax was in touch with them and had, he testified, probably told them the names of the vessels engaged. The transcription of the "hot" line telephone messages from NAS-Jax to RCC reflect that kinswomen were calling NAS-Jax frantically to find out what was being done. In one message NAS-Jax relayed a report that the women were getting an airplane to send out. And, of course, the word soon traveled fast when DUMBO located the DONALD RAY and had her under contact for nearly three hours.

ligence that the matter should be remanded for suitable apportionment (and reduction of damages) under the maritime doctrine of comparative fault.

We need not discuss the first any further. It is difficult to consider the second seriously. Obviously, the prior conduct of the DONALD RAY in going out, or in remaining at sea unaware of the small craft radio warnings, cannot be a defense to a failure to exercise due care in the rescue of such persons after the danger developed. The balance of the contention consists of assertions that the DONALD RAY should have radioed for help, should have broadcast an SOS or a May Day distress call and the crew members of the DONALD RAY should have used some of the conventional or make-shift signals generally employed at sea to indicate distress. These, a witness described, would be a smoke signal, red flag from the mast, inverted ensign, and the like. If those on the DONALD RAY were not in danger of the loss of their very lives one wonders why responsible officers of the Government were spending $100,000 in the earnest effort to rescue them. It is one thing to suggest that the pilot of the DUMAS—a flier but not a sailor—might have been justified in his report that the DONALD RAY "was not in danger." But not a single responsible seafaring officer undertook to testify that a little shrimper dead in the water without power, wallowing in the troughs of mountainous seas under winds then exceeding 50 knots and expected to go higher was not in the very shadow of death.

RCC needed no signal of distress. RCC knew it had lives to save from great and imminent peril. RCC did not need more information. All it needed was to heed what it had.

VI

The Government objects to the admission of two small pieces of evidence.

The first concerns Captain Bryant's testimony. After the admitted radio conversation from his vessel, DELEWATER II, about 11:00 a.m., he and Adkins went ashore to report this fact to the Coast Guard since they could not raise the Coast Guard by ship-to-shore radio. Adkins placed the call and Bryant repeated what he heard Adkins tell the person he addressed as the Coast Guard. This was not hearsay. The fact being proved was the conversation—that is what was stated in the conversation, not the truth of it.

The other concerned testimony of S. C. Powell, an operator of a drugstore in Mayport which was a sort of village center of communications. He testified that between 3:00 p.m. and 5:00 p.m. he answered the phone and a person identified himself as with the Coast Guard. This anonymous caller stated that the DONALD RAY had been sighted and the survivors would be picked up around 5:00 o'clock. He requested that the message be passed on in the village. Mr. Powell could not identify the person by name or rank except that the caller represented himself to be with the Coast Guard. No objection was made as the testimony was given, nor was any motion made to strike it at the close of cross examination. It was not until the close of the whole evidence in the case that the Government moved to strike it.

We need not consider its admissibility as such, for it could not possibly have been harmful. Almost

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The Appellees justified admissibility on these authorities McCormick, "Evidence," pages 405-406; *Van Riper* v. *United States*, 2 Cir., 1926, 13 F. 2d 961, cert. denied, 273 U.S. 702, 47 S. Ct. 102, 71 L. Ed. 848; *Andrews* v. *United States*, 10 Cir. 1935, 78 F. 2d 274; *Jarvis* v. *United States*, 1 Cir., 1937, 90

identical testimony was given by Captain Bryant without objection and without any motion then or later made to strike it.[22]

After a careful trial and a detailed and patient consideration of all of the evidence, the Trial Court applied proper legal standards and made fact conclusions which certainly pass muster under F.R. Civ. P. 52(a).

There it ends.

Affirmed.

F. 2d 243, cert. denied, 302 U.S. 705, 58 S. Ct. 25, 82 L. Ed. 544; 20 Am. Jur., "Evidence" § 368; 7 Wigmore, *Evidence* § 2155 at 617 (3 ed. 1940); *United States* v. *Bueur*, 7 Cir., 1952, 194 F. 2d 297.

[22] "Q. Later that day * * * were you informed that the Coast Guard had located the Donald Ray?

"A. Yes, sir, I was.

"Q. From whom did you hear that they had located the Donald Ray?

"A. Captain Floyd [a Mayport fisherman]. Captain Hilton Floyd stopped in front of my house * * * and told me, he says: 'Well,' he says, 'they've located the boys and they've got a plane circling them and it's only a matter of a few minutes now probably before the Coast Guard will rescue them.' He says: 'I think I haven't got anything to worry about now that they've found them; that's been the main trouble in locating them.'"

JUDGMENT

(Extract from the Minutes of July 22, 1960)

No. 18094.

UNITED STATES OF AMERICA

v.

GERALDINE GAVAGAN, AS ADMINISTRATRIX OF THE ESTATE OF JOHN GORDON GAVAGAN, DECEASED, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

U. S. GOVERNMENT PRINTING OFFICE : 1960